In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1121

WESTERN & SOUTHERN LIFE INSURANCE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Section 9(c)(5) of the National Labor Relations Act provides that, in determining whether a unit is appropriate for collective bargaining, "the extent to which the employees have organized shall not be controlling." In a consolidated proceeding, the National Labor Relations Board found that two separate units —one consisting of the Company's district office in McKeesport, Pennsylvania and the other of its district office in Wilkinsburg, Pennsylvania—were ap-

propriate for collective bargaining. 138 NLRB 588. The question presented is whether the Board's selection of these units, concededly proper on the basis of the reasons given by the agency, may be held to have been controlled by the extent to which the employees have organized, in violation of Section 9(c)(5), because the Board, in other cases involving employers in the insurance industry, consistently approved the unit sought by the union.

The court below answered this question in the negative. Its decision is in accord with its decision in a companion case and with decisions of the Fourth and Sixth Circuits in other cases involving the same legal issue. *Metropolitan Life Insurance Co.* v. *National Labor Relations Board*, 328 F. 2d 820 (C.A. 3), petition for certiorari filed, No. 982, this Term; *National Labor Relations Board* v. *Quaker City Life Insurance Co.*, 319 F. 2d 690 (C.A. 4); *Metropolitan Life Insurance Co.* v. *National Labor Relations Board* (C.A. 6), No. 15366, decided April 11, 1964. However, the decision of the court below is in conflict with the decision of the First Circuit in *Metropolitan Life Insurance Co.* v. *National Labor Relations Board*, 327 F. 2d 906.

The government believes that this conflict warrants resolution by this Court, and accordingly has filed a petition for certiorari to review the First Circuit decision, No. 1128, this Term. Moreover, Metropolitan has filed a petition for certiorari to review the decision of the court below in *Metropolitan Life Insurance Co.* v. *National Labor Relations Board*, 328 F. 2d 820, No. 982, this Term, and the government has

stated that it does not oppose the grant of that petition if the petition in No. 1128 is also granted. The instant case presents the same issue as the two *Metropolitan* cases in a nearly identical factual setting, as the court below recognized by treating its decision in *Metropolitan* as dispositive of the issues presented here (Pet. 18). In these circumstances, we suggest that, if the Court grants the petitions in Nos. 982 and 1128, it should hold the present petition on the docket pending the decisions in those cases, and then dispose of it in accordance therewith.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LAURENCE S. GOLD,
Attorney,

National Labor Relations Board.

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